No. 88-1947

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

INTERTRIBAL COUNCIL OF NEVADA, INC.,
Petitioner

v.

MANUEL LUJAN, JR., individually and as Secretary of the Interior of the United States of America, and THE STATE OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY

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QUESTIONS PRESENTED

1. Whether the Inter-Tribal Council of Nevada, Inc. (the Council) has standing to demand petition for forfeiture of the Stewart Indian School lands because the Council and its individual member tribes are former beneficial owners under 25 U.S.C. § 293a.

2. Whether the Council has standing to pursue this action under 28 U.S.C. § 1331, 1362 and 25 U.S.C. § 443a.

3. Whether the Council has standing under the Administrative Procedure Act 25 U.S.C. § 702 to request review of a violation of the Bureau of Indian Affairs manual.

4. Whether the State of Nevada has voliated the conditions of transfer.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra, 1a - 16a) is reported at 856 Fed.2d 1344 (9th Cir. 1988). The opinions of the district court (Appendix C, infra, 18a - 22a) 592 F.Supp. 1297 (1984)

and Appendix D, infra, 23a - 41a.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1988. Petition for rehearing was denied on December 21, 1988. (Appendix B, infra 17a) The petition for rehearing was timely filed pursuant to Rule 20.4. The time for filing a Petition for Writ of Certiorari is 90 days from the date of denial of the petition for rehearing, which was December 21, 1988, and therefore the Petition for Writ of Certiorari is due on March 20, 1989. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21(f) the statutory provisions involved are cited below and their pertinent text is set forth in Appendix E (infra, 42a - 55a).

1. 5 U.S.C. § 701, 702, 704, 706.

2. 25 U.S.C. § 293a, 443a.

3. 28 U.S.C. § 1331, 1362

4. 18 U.S.C. § 1151

5. 43 B.I.A.M., Supplement § 11.19

6. Nevada Legislative Act of 1887.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE PETITION

1. There is a conflict of authorities as to whether the Council or any of its members are former beneficial owners under 25 U.S.C. § 293(a).

A review of the record shows clearly that the facts are analogous to C.M.J. v. State, 594 P.2nd 798 (Okla. 1979). The lands in this case were clearly set aside for an Indian school, not for a public school as they were in U.S. v. Meyer, 202 Fed.2d 387 (8th Cir. 1913).

It can't be ruled out that the Indian school in this case was indeed Indian

country, and as such was held in trust for the Indian population that was benefitted, which included Nevada Indian tribes as well as other Indian tribes that used the school.

II. The Council has asserted and shown it has standing to assert a claim for relief under 25 U.S.C. § 443(a).

For the reasons stated in its petition and below, the Council clearly relied on 25 U.S.C. § 443(a) in this lawsuit, but because of the decision of the district court was not permitted to pursue its legal argument at trial.

III. The Council has standing under the Administrative Procedure Act to request a review of the alleged violation of the Bureau of Indian Affairs Manual.

It is the position of the Council that the action taken under the Administrative Procedure Act is independent of 25 U.S.C.

293(a). However, if the court concludes that the Administrative Procedure Act does not give an independent basis to review a violation of the BIAM, the Council clearly has standing under 25 U.S.C. 293(a). Not only is it the group of tribes that were former beneficial owners, but they are a competing local government that should be entitled to a transfer of lands the same as the State of Nevada.

ARGUMENT IN REPLY TO RESPONDENTS' STATEMENT OF FACTS RELEVANT TO THE ISSUES

The federal and the state respondents in their respective briefs in opposition state that the Council failed to plead or rely in district court on the provisions of 25 U.S.C. § 443(a). State's brief, page 7; federal brief, page 7.

This is clearly an incorrect statement of fact. A review of the record in this case demonstrates that the Council was

relying on 25 U.S.C. § 443(a) as well as 25 U.S.C. § 293(a). 43 BIAM Supplement 2, Section 11.19, the regulations interpreting 25 U.S.C. § 443(a) were attached a Exhibit "E" to the Council's Application for Preliminary Injunction, filed June 10, 1982. (CR 3, CR 10, CR 12)

In the complaints filed in district court, the Council alleged that the Secretary of the Interior could have transferred the site to it under 25 U.S.C. § 293(a), 25 U.S.C. § 465, and 25 U.S.C. § 467, as well as other federal statutes and regulations not enumerated. (CR 1 at 7, para. 20; CR 30 at 7, para. 20; CR 47 at 6, para. 20). Other federal statutes not enumerated included 25 U.S.C. § 443(a), because at the time the complaint was filed the attorney for the Council was not aware of the basis on which the Council had filed its originial application.

The council clearly raised the issue of the application of 25 U.S.C. § 443(a) in its opposition to the State's and the federal motions to dismiss (CR 41, filed January 26, 1984; CR 43, filed March 14, 1984).

The argument raised by the Council in its opposition was denied by the district court in its memborandum opinion dated September 21, 1984 (CR 46) where the court limited the trial to the cause of action under 25 U.S.C. § 293(a).

The State also argues the Council omitted details regarding the closure of the school in 1980, and that Congress decided to cut off the funding for the school after determining that it was unsafe and too expensive to repair. However, the facts brought out during the trial show that the federal government has funded most of the repairs to the school since its

closure, and, in fact, determined to lease the school back from the State. Clearly the stated purpose for closing the school was contrary to the facts as demonstrated during the trial in this case.

CONCLUSION

A review of the facts in this case shows an arbitrary and capricious decision by the Bureau of Indian Affairs. Not only has the Bureau breached its trust responsibility by ignoring the Council's application under 25 U.S.C. § 443(a), it has acted in complete disregard of Congress. It was supposed to close the Stewart Indian School in order to save the tax payers money.

The Bureau then gave away the Indian school in violation of its own rules, as established in its manual, and has failed to ensure that the State of Nevada lived up to the conditions of the transfer.

For these reasons, the court of appeals' decision should be reversed; the transfer of the Stewart Indian school lands should be forfeited; and title should be restored to the federal government.

The federal government should then fairly evalutate the competing applications of the Indian tribes and the State of Nevada, making a determlination based on the facts as to who is best prepared to protect and preserve this national historic monument. It would a travesty to the Indian people of this nation if the State of Nevada were able to continue on its present course of conduct and allow the Stewart Indian School to deteriorate any further.

Respectfully submitted.

Peter J. Sferrazza

AUGUST 15, 1989